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NO. 547

In the Supreme Court of the United States

October 1932 Term

WALTER H. GANT, KNOX L. GARVIN,
and A. D. HUDSPETH,
Appellants.

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation,
and J. W. VANMETER,
Appellees.

REPLY BRIEF

Since appellants' brief was prepared the Supreme Court of the United States has handed down the decision in the case *of R. S. Sterling, Governor of the State of Texas,* vs. *E. Constantine,* 77 L. ed. 254, where this court uses the following language:

> "The right of the owner of petroleum-producing property to its enjoyment and use, subject to reasonable regulation by the state in the exercise of its power to prevent unnecessary loss, destruction, and waste, is protected by the due process clause of the Fourteenth Amendment."

This property right of the appellants was violated by delegating to the surety companies the option to say whether or not the owner could produce oil and gas from their property.

The courts hold that permitting others than the legislative authorities to decide whether property shall be put to a certain use is a delegation of legislative authority. This is the reason lying back of the holding that such enactments are violative of the 14th amendment.

The latest expression that we have been able to find is the case of *Re: Samuel Perrin*, 305 Pa. 42, 156 Atl. 305, 79 A. L. R. 912. The opinion reads:

> "Where an ordinance shows that a use is not opposed to public health, safety, morals, or general welfare, or is not a nuisance, and is in harmony with public interest and the general scope of the zoning ordinance, but the consent of a given set of individuals must be procured before land may be devoted to such use, the delegation of such power to these individuals is repugnant to the due process clause of the Fourteenth Amendment. The reasons for holding consent ordinances invalid may be summed up thus: The consent provision is an unlawful delegation of legislative authority and discretion, with no rule or standard to guide those whose decision will control. It is not possible to check or correct the acts of the persons who may or may not consent; consent or refusal may be the result of favoritism, caprice, or malice, and no responsibility can be placed on those who act in the matter."

This decision is based on and follows the decision of this court in *State of Washington ex rel.* vs. *Roberge*, 278 U. S. 116, 73 L. ed. 210.

So in the case at bar the legislative authorities of the City have recognized that it is not against the public interest to permit drilling at the place in question; but by the same fiat they have said the owner cannot drill without the consent of one or more sureties over whom the owners have no control.

The learned opinion of this court in the recent case of *Hodge Drive-It-Yourself Co.* v. *Cincinnati*, 284 U. S. 333, 76 L. ed. 323, illustrates the difference between a regulation of the use of one's own property and the right to impose conditions upon or prohibit the use of public streets and highways.

The ordinance there, which prescribed the giving of a surety bond where the public streets were used to carry on private business for gain was upon the specific ground that the city had the right to condition or prohibit such a use, not regulate it. There is a vast difference between prescribing an impossible condition in respect to the use of one's own property, and placing condition on the use of a public street for private gain.

The court says:

> "This ordinance is not an interference with or regulation of a business that has no relation to matters of public concern; it rests upon the power of the city to prescribe the terms upon which it will permit the use of its streets to carry on business for gain."

It is suggested by appellees that equitable jurisdiction might not be invoked to enjoin the enforcement of this unconstitutional ordinance for the reason that the appellants applied to and secured from the Board of Adjustment of the City of Oklahoma City an order and judgment authorizing the issuance of the permit herein. That an appeal might be necessary from said order and an estoppel worked by reason of complying with the valid provisions of the ordinance.

This position is untenable for several reasons.

1. The evidence shows that the executive officer of the City to-wit; the Building Superintendent, refused to carry out the order of the Board of Adjustment unless and until the unconstitutional bond was furnished. The statute of the state provides for no appeal from his executive order.

2. Where the property owner has made a proper application for a permit and the executive officer has refused to issue the same on account of an unconstitutional ordinance, equitable jurisdiction is clear to enforce the right of the property owner.

Village of Euclid vs. *Ambler Realty Co.*, 272 U. S. 365, 71 L. ed. 303, 54 A. L. R. 1016, 47 Sup. Ct. Rep. 114.

State of Washington ex rel Seattle Trust Company vs. *Roberge*, 278 U. S. 116; 73 L. ed. 210.

Terrace v. *Thompson*, 263 U. S. 197, 215, 68 L. ed. 255, 274, 44 Sup. Ct. Rep. 15.

Pierce v. *Society of Sisters*, 268 U. S. 510, 535, 69 L. ed. 1070, 1078, 39 A. L. R. 468, 45 Sup. Ct. Rep. 571.

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of the State of Oklahoma be reversed and the cause remanded with proper directions.

Respectfully submitted.

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